

In the Matter of

## Petition of Waiver of Deadlines In 47 C. F. R. §54.314(d)

CC Docket No. 96-45

<sup>4</sup> See 47 C.F.R. § 54.307(c).

competitive ETC must generally have filed a certification with the FCC by October 1, 2002, stating that all federal high cost support it receives will be used for the provision, maintenance, and upgrading of facilities and services for which the support is intended (the § 54.314 Certification).<sup>5</sup> However, as explained below, the Commission's certification rules fail to provide a supplemental certification mechanism for carriers that are granted ETC designation after October 1, 2002, thereby creating a delay in funding of up to one year for new ETCs.<sup>6</sup> As a result, San Isabel will be denied universal service support for the entirety of 2003 unless the Commission grants this request. As set forth below, a waiver of the October 1, 2002 certification deadline to allow San Isabel to receive high cost universal service support beginning with the first quarter of 2003 would be consistent with the Commission's well-established pro-competitive and competitively neutral universal service policies and would serve the public interest.

## **BACKGROUND**

San Isabel is a small rural CLEC operating in the Colorado exchanges of Eagle, Edwards, Gypsum, and McCoy. On December 30, 2002, with Decision No. C03-022, the Colorado Public Utilities Commission ("the CPUC") designated San Isabel Telecom, a rural CLEC, as an Eligible Telecommunications Carrier in the State of Colorado. San Isabel attempted to self-certify with USAC and the FCC on April 1, 2003 because the San Isabel was told by the CPUC that it would not certify CLECs on a *prospective* basis that USF support *would* be used for its intended purpose. San Isabel also filed working loop data on June 30, 2003 in accordance with Section 54.307 of the Commission's

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<sup>5</sup> See 47 C.F.R. § 54.314(a)

rules.<sup>7</sup> Given the self-certification and line count filings, San Isabel expected to receive USF by at least the 4<sup>th</sup> quarter of 2003 (absent the granting waiver request for support for all of 2003). However, the FCC told San Isabel that the self-certification would not be accepted and that the CPUC would need to certify San Isabel prior to USAC giving support payments to San Isabel. After additional discussions and clarifications, the CPUC did certify San Isabel pursuant to Section 54.314(a) on September 24, 2003. This state certification ensures that San Isabel is eligible to receive support beginning in 2004. But since San Isabel has been an ETC since December 30, 2002, San Isabel is requesting to receive support for all of 2003.

Pursuant to Section 214(e) of the Communications Act of 1996, as amended (“the Act”), San Isabel became eligible to begin receiving rural high-cost support on December 30, 2002, the date that the Colorado PUC granted ETC status to San Isabel. However, Section 54.314 Certification rules established an October 1, 2002 filing deadline for Certifications to obtain support commencing with the first quarter of 2003.<sup>8</sup> As explained above, this deadline was 90 days prior to San Isabel’s obtaining ETC status.

Absent a waiver of the Commission’s rules, San Isabel would only be eligible to receive support beginning in 2004. The Commission did not intend this result. Since the majority of newly designated ETCs are competitive carriers, this timing problem with the rules unfairly disadvantages new entrants and violates the Commission’s well established

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<sup>6</sup> See 47 C.F.R. § 54.314.

<sup>7</sup> Section 54.307 requires competitive ETCs to file working loop data in accordance with a quarterly schedule as a prerequisite for the receipt of universal service support.

<sup>8</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourteenth Report and Order and Twenty-Second Order on Reconsideration, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Report and Order, 16 FCC Rcd 11244 (Released May 23, 2001) Rural Task Force Order).

universal service policy of competitive neutrality. Furthermore, the Commission has repeatedly recognized that the designation of competitive ETCs promotes competition and benefits consumers in rural and high-cost areas.<sup>9</sup> Forcing ETCs such as San Isabel to experience a delay in receipt of Universal Service support of *one year after receiving ETC designation* is not in the public interest and undermines the Commission's commitment to resolve Section 214(e) ETC designations expeditiously. The Commission committed to resolving ETC requests within 6 months (and encouraged states to do the same) out of concern that excessive delay in designation of competing providers may hinder competition and the availability of service in high-cost areas.<sup>10</sup>

### **REQUEST FOR WAIVER**

Section 1.3 of the Commission's rules provides the Commission with discretion to waive application of any of its rules upon a showing of good cause. In addition, Section 1.925(b)(3) provides for waiver where it is shown that:

- (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or

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<sup>9</sup> *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier In the State of Wyoming*; *Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order, CC Docket No. 96-45, 12 FCC Rcd 48 (2000); *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for Pine Ridge Reservation in South Dakota*; *Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order, CC Docket No. 96-45, FCC 01-283 (rel October 5, 2001).

<sup>10</sup> *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, 15 FCC Rcd. at 12264-65, para 114.

- (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>11</sup>

Federal courts have also recognized that “a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such a deviation would serve the public interest.”<sup>12</sup> The Commission “may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”<sup>13</sup>

As explained above, the Section 54.314 Certification process created an unintended consequence with respect to San Isabel by delaying USF support beyond the first quarter of 2003. This result is inconsistent with and frustrates the underlying purposes of the Commission’s rules, and is inequitable and unduly burdensome to San Isabel. This result is magnified given the current negative state of capital markets, which has had a devastating nationwide impact on competitive carriers. Strict application of the Section 54.314 process is inconsistent with the public interest.

For reasons stated herein, San Isabel submits that granting a waiver of the filing deadline set forth in Section 54.314(d) of the rules to allow San Isabel to receive universal service support beginning with the first quarter of 2003 is appropriate, consistent with the Commission’s statutory goal of preserving and advancing universal

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<sup>11</sup> See 47 C.F.R. § 1.925 (b)(3)

<sup>12</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990); *see also WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert denied*, 409 U.S. 1027 (1972)

<sup>13</sup> *Northeast Cellular Telephone Co.*, 897 F. 2d 1166 (*citing WAIT Radio* 418 F.2dat 1159).

service, and will advance the public interest. If the Commission were to grant San Isabel's waiver request, San Isabel will file the appropriate line count data with USAC necessary for it to determine the amount of support San Isabel is eligible to receive beginning with the 1<sup>st</sup> quarter of 2003. Should the Commission decide not to grant the waiver necessary for San Isabel to receive support for all of 2003, despite the FCC's granting of a similar request by RFB Cellular,<sup>14</sup> San Isabel requests the FCC deem the April 1, 2003 self certification to be acceptable and allow San Isabel to at least receive support beginning with the 4<sup>th</sup> quarter of 2003 based on the line count data San Isabel submitted to USAC on June 1, 2003. Expedited action is requested to minimize the economic and competitive damage that further delay in the receipt of support is causing to San Isabel. In light of the unprecedented decline of the competitive carrier industry and the associated tightening of capital markets for competitive carriers over the past 2 years, it is critical that support begin at the earliest possible date to maintain competition and to level the playing field with incumbent carriers.

DATED this 26th day of January, 2004

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Paula Wagner Gordon  
Vice President, Carrier Relations

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<sup>14</sup> *Federal-State Joint Board on Universal Service*, CC Docket No, 96-45, *RFB Cellular, Inc. Petitions for Waiver of Sections 54.314(d) and 54.307(c) of the Commission's Rules and Regulations*, Order DA 02-3316 (Released December 4, 2002).